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11 Attorneys for Plaintiffs Richard A. Noble and Charlene R. Noble

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

14 RICHARD A. NOBLE, and CHARLENE R.
 15 NOBLE,

16 Plaintiffs,
 vs.

17 KIEWIT PACIFIC CO., a Delaware
 corporation; LIFE INSURANCE
 18 COMPANY OF NORTH AMERICA, a
 Pennsylvania corporation; PETER KIEWIT
 19 SONS', INC. HEALTH AND WELFARE
 PLAN; PETER KIEWIT SONS', INC., a
 20 Delaware corporation; JOHN JANSEN, an
 individual; MICHAEL PHELPS, an
 21 individual; and JANE SEWELL, an
 individual

22 Defendants.

C08 00666

BZ

COMPLAINT FOR:

- (1) ENFORCEMENT AND CLARIFICATION OF RIGHTS UNDER ERISA PLAN;
- (2) BREACH OF FIDUCIARY DUTY UNDER ERISA;
- (3) DISCRIMINATION ON THE BASIS OF DISABILITY/MEDICAL CONDITION: FAILURE TO ENGAGE IN THE INTERACTIVE PROCESS;
- (4) DISCRIMINATION ON THE BASIS OF DISABILITY/MEDICAL CONDITION: FAILURE TO ACCOMMODATE;
- (5) DISCRIMINATION ON THE BASIS OF MEDICAL CONDITION: WRONGFUL DISCHARGE FROM EMPLOYMENT ON THE BASIS OF MEDICAL CONDITION;
- (6) TORTIOUS TERMINATION IN VIOLATION OF PUBLIC POLICY;
- (7) BREACH OF CONTRACT;
- (8) BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

DEMAND FOR JURY TRIAL

1 Plaintiffs Richard A. Noble and Charlene R. Noble allege:

2 1. Plaintiff Richard A. Noble ("Plaintiff") is a 55-year-old adult male, (DOB April 21,
3 1952) and, at all relevant times, has resided in Contra Costa County, California. Plaintiff was
4 employed by defendants in Contra Costa County, California, and the defendants' conduct hereinafter
5 alleged occurred in said County and State. Plaintiff is informed by several medical professionals that
6 he is dying of cancer and may have less than one month to live.

7 2. Plaintiff Charlene R. Noble is Plaintiff's wife and also resides in Contra Costa County,
8 California. She is also a beneficiary of her husband, including but not limited to any insurance
9 benefits related to his employment by Kiewit.

10 3. On information and belief, Kiewit Pacific Co. ("Kiewit") is a Delaware corporation
11 that regularly does business in the County of Contra Costa, California. Kiewit maintains a business
12 office at 5000 Marsh Dr., Concord, CA 94520. Kiewit is registered with the California Secretary of
13 State as a Corporation No. C1125955. Kiewit is an employer as defined in the California Fair
14 Employment and Housing Act (FEHA) and the employer of Plaintiff.

15 4. On information and belief, defendant Life Insurance Company of North America
16 ("Life Insurance Company") is a Pennsylvania corporation that regularly does business in the State of
17 California, including the marketing, sale, and issuance of health insurance and health care service
18 plans. On further information and belief, Life Insurance Company is a wholly owned subsidiary of
19 CIGNA Corporation.

20 5. On information and belief, defendant Peter Kiewit Sons', Inc. Health and Welfare Plan
21 (the "Plan") is a health and welfare benefits plan issued by Life Insurance Company and with an
22 Employer Identification Number of 91-1842817.

23 6. On information and belief, defendant Peter Kiewit Sons', Inc. ("Plan Administrator")
24 established, maintained, and administers the Plan.

25 7. On information and belief, defendant John Jansen ("Jansen") is a manager and
26 employee of Kiewit. On further information and belief, at all times relevant to the matters alleged in
27 this complaint, Jansen acted as Plaintiff's direct supervisor at Kiewit.

28 8. On information and belief, defendant Michael Phelps ("Phelps") is a manager and

1 employee of Kiewit. On further information and belief, at all times relevant to the matters alleged in
 2 this complaint, Phelps was the Kiewit Divisional Vice President and Jansen's direct supervisor.

3 9. On information and belief, at all relevant times defendant Jane Sewell ("Sewell") was
 4 a manager and employee of Peter Kiewit Sons', Inc. as its Equal Opportunity Officer ("EEO") and
 5 performed administrative duties relating to the Plan.

Jurisdiction

6 10. This Court has subject matter jurisdiction under 29 U.S.C. § 1132(e)(1) of the
 7 Employee Retirement Income Security Act of 1974 (29 U.S.C. §§ 1001-1461) ("ERISA"). This Court
 8 has supplemental jurisdiction under 28 U.S.C. § 1337 for all non-ERISA causes of action as they
 9 arise out of the same case or controversy.
 10

11 11. This Court has personal jurisdiction over each of the defendants because they either
 12 reside or have done substantial business in this judicial district and have committed the alleged
 13 wrongful acts in this judicial district.
 14

Venue

15 12. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §§ 1331
 16 and 1333, as a substantial part of the acts or omissions giving rise to this action occurred in the
 17 Northern District of California.
 18

Intradistrict Assignment

19 13. Assignment to the Oakland district is proper pursuant to the District's assignment plan
 20 and Civil L.R. 3-2(c) because several of the parties reside in Contra Costa County.
 21

General Allegations

22 14. On January 16, 2006, Plaintiff was hired by Kiewit as the District Human Resources
 23 Manager for the Northern California District.
 24

15. Plaintiff excelled in his work performance at Kiewit and was awarded a substantial
 25 bonus based on his 2006 performance. Plaintiff also earned a merit salary increase after 6 months of
 26 employment and a second merit increase in April of 2007.
 27

16. In early 2001, when Plaintiff was 49 years old, Plaintiff was diagnosed with cancer.
 28 Since that time, Plaintiff has undergone various treatments and surgeries that seemed to keep the
 29

1 cancer under control. Indeed from September 2001 through January of 2006, Plaintiff had not
2 suffered from any noticeable cancer symptoms and appeared to have fully recovered.

3 17. From January 2006 through August 2006, following his commencement of work at
4 Kiewit, Plaintiff performed well and suffered no major health problems which prevented him from
5 meeting or exceeding his work goals until August of 2006.

6 18. In August of 2006, Plaintiff developed severe stomach problems and a fever. While
7 Plaintiff's doctor originally suspected that those problems were caused by a parasite, Plaintiff soon
8 came to realize that his cancer had reemerged and was swiftly spreading throughout his body.

9 19. During the fall of 2006, between September and December, Plaintiff informed Jansen
10 and his colleagues that his cancer had come back and that would need to be treated.

11 20. In December of 2006, Plaintiff provided Jansen with a letter from his oncologist
12 explaining that Plaintiff was undergoing treatments and that he would need reasonable
13 accommodations at work. But Jansen did not respond to that letter and Kiewit failed to extend the
14 requested accommodations. Kiewit also failed to enter into any interactive process to determine what
15 accommodations would be appropriate for Plaintiff so that he could continue working at the company
16 and attend to his cancer treatments.

17 21. In or about mid to late January of 2007, Plaintiff spoke with Jansen, and proposed that
18 Kiewit hire a junior-level human resources professional that Plaintiff could coach, and who could
19 assist with Plaintiff's job responsibilities while his cancer treatments were ongoing. Plaintiff
20 explained that while his cancer treatments were debilitating, he could continue to perform many of
21 his essential job functions from home, including developing a new employee handbook and assisting
22 with screening, interviewing, and assisting with accessing job interview candidates. That
23 conversation ended with a handshake and Plaintiff understood that Jansen would seriously consider
24 his proposal.

25 22. At Jensen's suggestion that he talk to Phelps, on that same day in mid-late January
26 2007, Plaintiff also spoke with Phelps who told Plaintiff not to worry about his job and that he
27 wished Plaintiff a swift recovery.

28 23. Kiewit ultimately ignored Plaintiff's requests for accommodations and did not propose

1 any solution to help Plaintiff manage his illness as well as his work responsibilities. Regardless,
2 Plaintiff did in fact continue to work from both hospital bed and home, contacting and responding to
3 communication from his subordinates, receiving and forwarding on emails with instructions pertinent
4 to them and delegating responsibilities to his staff assistant, Lindsay Hicks.

5 24. Plaintiff continued to review and approve projects and tasks and to give advice to
6 subordinates concerning what to do with various situations, occasionally meeting with the recruiter to
7 support her in various areas of responsibility now delegated to her. Plaintiff also continued to use his
8 company provided Blackberry to communicate electronically with his staff regarding company
9 business, and to make business decisions and give advice to his subordinates.

10 25. During, between and after Plaintiff's chemotherapy treatments concluded in May of
11 2007, Plaintiff was prepared to return to work part time. But in or about April 2007, Plaintiff learned
12 that Kiewit had hired a new Human Resources Manager, named Greenbaum, rather than hiring a
13 junior-level professional to assist Plaintiff.

14 26. Plaintiff thereafter sent an email to Jansen expressing his dismay, concern and
15 confusion about Kiewit's decision to hire a new Human Resources Manager and stating that he
16 thought they had a different understanding. Plaintiff explained to Jansen that he hoped to return to
17 work full time and asked what his new responsibilities, duties and reporting relationships would be in
18 light of Kiewit's hiring of Greenbaum, given Jansen's oral commitment to retain Plaintiff with the
19 same title with no loss of pay.

20 27. Jansen replied with a letter expressing his happiness over Plaintiff's anticipated return
21 to work and requesting an estimated date of return from Plaintiff and his health care provider.

22 28. On April 19, 2007, Plaintiff responded to Jansen's letter with a handwritten letter and a
23 note from his oncologist, Dr. Solganic, stating that Plaintiff was "undergoing comprehensive
24 chemotherapy" and would need some periods of recuperation before he could return to work in a full-
25 time position. Plaintiff's letter estimated that he would return to work in "later summer/early fall."

26 29. Jansen replied with a letter dated May 1, 2007 stating that, based on his estimated
27 return date of "late summer or early fall," Kiewit was changing his status in the meantime to
28 "administrative separation from employment." Jansen did not explain what that meant and did not

1 explain the implications of that new designation, other than to state that such designation “will allow
2 Kiewit to continue your benefits via COBRA.” According to Jansen’s letter, Plaintiff’s timely
3 designation to COBRA would ensure that his “medical, dental and supplemental life benefits will
4 continue.” Jansen also provided Plaintiff with a form entitled “Peter Kiewit’s Sons’, Inc. Welfare
5 Benefits Plan Medical/Dental COBRA Continuation Coverage Election form” (the “COBRA
6 Continuation Form”) along with a \$9,499.27 check to cover the monthly COBRA payments through
7 November 30, 2007. At that time, Plaintiff was covered under a \$200,000 life insurance plan.,
8 Additionally, Plaintiff was covered under insurance policies for disability. These were important
9 benefits since he was suffering from cancer.

10 30. Plaintiff promptly completed the COBRA Continuation Form, as instructed, and
11 returned it to Kiewit. On information and belief, Kiewit received the completed COBRA
12 Continuation Form on or about May 22, 2007. Plaintiff also made the requisite payments for the
13 COBRA continuation.

14 31. After receiving Jansen’s May 1, 2007 letter, Plaintiff also telephoned Jansen to discuss
15 his letter. Jansen did not respond.

16 32. In June of 2007, Plaintiff’s company-provided Blackberry ceased to function. When
17 Plaintiff called Kiewit’s IT specialist to find out what happened, he was told that that he was no
18 longer a Kiewit employee.

19 33. Upon hearing that news, Plaintiff phoned Sewell, the EEO for Kiewit ‘s home office
20 in Omaha, Nebraska, and left a message asking what was going on.

21 33. Sewell called Plaintiff back in July and told him that she would look into the matter.

22 34. Finally, Sewell called Plaintiff on August 4, 2007 explaining that, after investigating the
23 matter, she determined that Plaintiff had been terminated effective May 1, 2007. Further, Sewell
24 informed Plaintiff that he was not entitled to continuation of his life insurance benefits because he
25 had not filled out the appropriate forms.

26 35. Plaintiff explained to Sewell during that conversation that he completed and returned all
27 forms provided to him and did everything that Jansen had instructed him to do. Plaintiff further
28 expressed his confusion over his “termination” as Jansen and Phelps had both told him not to worry

about his job and Jansen's May 1, 2007 letter said nothing about him being "terminated." Plaintiff told Sewell that Kiewit had wrongfully terminated his employment as a result of his medical condition.

4 36. When Plaintiff spoke to Sewell, he did so with the expectation that Kiewit would
5 investigate his unlawful discharge, but Kiewit did not.

6 37. In August of 2007, Plaintiff filed a complaint with the California Department of Fair
7 Employment and Housing, Case No. E200708M0533-00-fpe/37AA808047, NOBLE/KIEWIT
8 PACIFIC CO.

9 38. On January 18, 2008, at Plaintiff's request, the California Department of Fair
10 Employment and Housing issued to Plaintiff a Right-To-Sue Notice. Plaintiff now brings this action.

FIRST CAUSE OF ACTION
Action to Enforce or Clarify Rights Under ERISA Plan
(Against Defendants Plan Administrator and Plan)
29 U.S.C. § 1132(a)(1)(B)

39. Plaintiff incorporates each allegation set forth in paragraphs 1-38.

40. At all relevant times, Plaintiff was a “participant” of the Plan within the meaning of 29 USC § 1132(a)(1).

41. At all relevant times, Plaintiff Charlene R. Noble was a “beneficiary” of the Plan within the meaning of 29 USC § 1132(a)(1).

42. While the Plan was in full force and effect, Plaintiffs were entitled to receive present and future health benefits under the Plan.

43. Defendants have wrongfully denied plaintiffs benefits under the plan and have taken the incorrect position that plaintiffs are not entitled to future benefits under the Plan including, but not limited to, future life insurance benefits of \$200,000 upon the death of Plaintiff.

44. Pursuant to 29 U.S.C. § 1132(a)(1(B), plaintiffs seek judgment against the Plan and the Plan Administrator awarding plaintiffs any and all benefits due to them under the terms of the Plan, enforcing their rights under the terms of the Plan, and clarifying their rights to future benefits under the terms of the Plan.

SECOND CAUSE OF ACTION

Breach of Fiduciary Duty under ERISA

(Against Defendants Plan Administrator, Kiewit, Life Insurance Company, Hartford, Jansen, Phelps, and Sewell)

29 U.S.C. §§ 1104(a)(1); 1109; 1132(a)(2)

45. Plaintiff incorporates each allegation set forth in paragraphs 1-44.

46. At all material times herein, defendants Plan Administrator, Kiewit, Life Insurance Company, Jansen, and Phelps were fiduciaries with respect to their exercise of authority over the management of the Plan, disposition of Plan assets, and administration of the Plan.

47. Defendants, and each of them, were obligated to discharge their duties solely in the interests of beneficiaries and participants of the Plan for the exclusive purpose of providing beneficiaries and participant benefits, promptly and accurately advising all beneficiaries of their rights under the plan, defraying reasonable expenses of the Plan, and using all prudent skill and diligence in accordance with the documents and instruments covering the Plan.

48. Defendants, and each of them, breached their fiduciary duties, as alleged above, with respect to Plaintiffs and other beneficiaries and participants.

49. Plaintiffs assert a breach of fiduciary duty against these defendants on behalf of and for the benefit of the Plan.

50. Plaintiffs request a judgment (a) permanently enjoining these defendants from further failing to comply with the terms of the Plan; and (b) requiring these defendants to restore coverage to all beneficiaries, including plaintiffs, whose coverage was improperly denied to them.

THIRD CAUSE OF ACTION

THIRD CAUSE OF ACTION:

Failure To Engage In The Interactive Process

(Against Defendants Kiewit, Jansen, Phelps and Sewell)

51. Plaintiff incorporates each allegation set forth in paragraphs 1-38.

52. Pursuant to the California Fair Employment and Housing Act (“FEHA”), including Cal. Code §§ 12940(n) and 12926.1(e), defendants were legally mandated to engage in a timely, with interactive process in response to Plaintiff’s request for reasonable accommodation based own medical condition.

53. Defendants were aware of Plaintiff's medical condition from January 2007 onward, but

1 made no attempt to engage Plaintiff in any interactive process to determine what accommodations
2 would be necessary for him to perform his job.

3 54. Defendants discriminated against Plaintiff on the basis of his disability, by failing to
4 engage in the interactive process. As a proximate cause of this discrimination Plaintiff suffered and
5 continues to suffer substantial losses in earnings; humiliation, emotional distress, mental and physical
6 pain and anguish, all to his damage in a sum according to proof. In light of Defendant's willful,
7 knowing and intentional discrimination against Plaintiff, Plaintiff seeks an award of punitive and
8 exemplary damages in an amount according to proof; further, plaintiff has incurred and continues to
9 incur legal expenses and attorney fees. Plaintiff is presently unaware of the precise amount of these
10 expenses and fees and prays leave of court to amend this complaint when the amounts are more fully
11 known.

FOURTH CAUSE OF ACTION

Discrimination On The Basis Of Disability/Medical Condition: Failure To Accommodate (Against Defendants Kiewit, Jansen, Phelps and Sewell)

14 55. Plaintiff incorporates each allegation set forth in paragraphs 1-38 and 52-54.

15 56. Pursuant to FEHA, including Cal. Gov. Code § 12940(m), Defendants had an affirmative
16 duty to make reasonable accommodations to Plaintiff for his known disabilities to enable him to
17 perform the essential functions of his position.

18 57. Pursuant to Cal. Gov. Code § 12926(n), such accommodations include, but are not
19 limited to, job restructuring, offering part-time or modified work schedules, reassigning to a vacant
20 position, acquiring or modifying equipment or devices, other similar accommodations.

21 58. Defendants did not extend reasonable accommodations to Plaintiff prior to terminating
22 his employment.

23 59. Defendants discriminated against Plaintiff on the basis of his disability because they
24 failed to provide him with accommodations, in violation of the California Fair Employment and
25 Housing Act. As a proximate cause of this discrimination Plaintiff suffered and continues to suffer
26 substantial losses in earnings; humiliation, emotional distress, mental and physical pain and anguish,
27 all to his damage in a sum according to proof. In light of Defendant's willful, knowing and
28 intentional discrimination against Plaintiff, Plaintiff seeks an award of punitive and exemplary

1 damages in an amount according to proof; further, plaintiff has incurred and continues to incur legal
 2 expenses and attorney fees. Plaintiff is presently unaware of the precise amount of these expenses
 3 and fees and prays leave of court to amend this complaint when the amounts are more fully known.

4 **FIFTH CAUSE OF ACTION**

5 Discrimination On The Basis Of Medical Condition: Wrongful Discharge from Employment on the
 Basis of Medical Condition
 6 (Against Defendants Kiewit, Jansen, Phelps, and Sewell)

7 60. Plaintiff incorporates each allegation set forth in paragraphs 1-38 and 52-59.

8 61. Pursuant to FEHA, including Cal. Gov. Code § 12940(a) and (c), an employer may not
 9 bar or discharge a person from employment based on an individual's medical condition.

10 62. Defendants committed unlawful discrimination by discharging him solely because of his
 11 medical condition.

12 63. As a proximate cause of that discrimination Plaintiff suffered and continues to suffer
 13 substantial losses in earnings; humiliation, emotional distress, mental and physical pain and anguish,
 14 all to his damage in a sum according to proof. In light of Defendant's willful, knowing and
 15 intentional discrimination against Plaintiff, Plaintiff seeks an award of punitive and exemplary
 16 damages in an amount according to proof; further, plaintiff has incurred and continues to incur legal
 17 expenses and attorney fees. Plaintiff is presently unaware of the precise amount of these expenses
 18 and fees and prays leave of court to amend this complaint when the amounts are more fully known.

19 **SIXTH CAUSE OF ACTION**

20 Tortious Termination in Violation Of Public Policy
 (Against Defendants Kiewit, Jansen, Phelps and Sewell)

21 64. Plaintiff incorporates each allegation set forth in paragraphs 1-38 and 52-63.

22 65. An employer-employee relationship existed between Plaintiff and Defendants.

23 66. Defendants' termination of Plaintiff's employment was a violation of public policy.

24 There was a nexus between Plaintiff's termination and Plaintiff's protected rights pertaining to his
 25 disability and medical condition. The public policy of the State of California is set forth in the
 26 California Fair Employment and Housing Act, which prohibits discrimination and discharge on the
 27 basis of disability and medical condition.

28 67. As a proximate cause of this tortious termination, Plaintiff suffered and continues to

1 suffer substantial losses in earnings; humiliation, emotional distress, mental and physical pain and
2 anguish, all to his damage in a sum according to proof. In light of Defendant's willful, knowing and
3 intentional discrimination against Plaintiff, Plaintiff seeks an award of punitive and exemplary
4 damages in an amount according to proof; further, plaintiff has incurred and continues to incur legal
5 expenses and attorney fees. Plaintiff is presently unaware of the precise amount of these expenses
6 and fees and prays leave of court to amend this complaint when the amounts are more fully known.

SEVENTH CAUSE OF ACTION
Breach Of Contract
(Against Defendant Kiewit)

68. Plaintiff incorporates each allegation set forth in paragraphs 1-38 and 52-67.

10 69. There existed between Plaintiff and Defendant an implied-in-fact contract not to
11 discharge without good cause. Such a contract was established by a course of conduct, including oral
12 representations. Plaintiff relied on those actions and representations to his detriment.

13 70. Defendants breached the implied-in-fact employment contract by discharging Plaintiff
14 without good cause on May 1, 2007.

15 71. As a proximate cause of this breach of contract Plaintiff suffered and continues to suffer
16 damage in a sum according to proof.

EIGHTH CAUSE OF ACTION

Breach Of The Implied Covenant Of Good Faith And Fair Dealing: (Against Defendant Kiewit)

72. Plaintiff incorporates each allegation set forth in paragraphs 1-38 and 52-71.

20 73. The employment relationship between Plaintiff and Kiewit is fundamentally contractual.
21 Inherent in that contractual relationship is a covenant of good faith and fair dealing, which implies a
22 promise that each party will refrain from doing anything to injure the other's right to receive the
23 benefits of the agreement and which protects the parties' reasonable expectations.

24 74. The provisions of the California Labor Code are implied by law into all employment
25 agreements, including the employment agreement entered into between Plaintiff and Defendant.

26 75. By engaging in the conduct as alleged herein, Defendant breached the implied covenant
27 of good faith and fair dealing.

28 76. As a proximate cause of that breach of covenant of good faith and fair dealing, Plaintiff

1 suffered and continues to suffer damage in a sum according to proof.

2 WHEREFORE, Plaintiff requests relief as hereafter provided.

3 PRAAYER FOR RELIEF

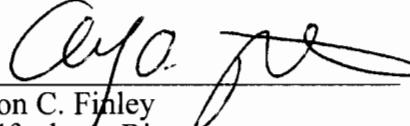
4 WHEREFORE, Plaintiff requests relief as follows:

- 5 1. For compensatory damages according to proof and prejudgment interest thereon to the
6 extent allowable by law;
- 7 2. For equitable and injunctive relief;
- 8 3. For exemplary and punitive damages according to proof;
- 9 4. For attorney fees and costs;
- 10 5. For such other and further relief as the court may deem proper.

11 REQUEST FOR JURY TRIAL

12 Plaintiffs requests a trial by jury for all issues that are so triable.

13
14 Dated: January 28, 2008

15 By: 
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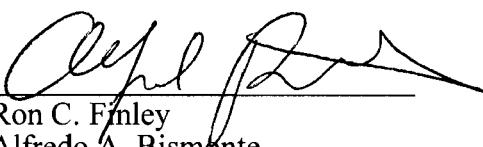
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24 Attorneys for Plaintiffs
Richard A. Noble and Charlene R. Noble

1 CERTIFICATION OF INTERESTED PARTIES
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Pursuant to Civil L.R. 3-16, the undersigned certifies that (in addition to the parties listed in the action) the following listed persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) could have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceedings: CIGNA Corporation (possible parent of Defendant Life Insurance Company of North America).

10 Dated: January 28, 2008
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